No. 200,569-1

SANDERS, J. (dissenting)—The appropriate sanction for an attorney convicted of willful failure to file a form with the Internal Revenue Service (IRS) is suspension from practice, as this court's precedent indicates. Precedent also indicates a willful failure to file does not constitute dishonesty for the purposes of an attorney disciplinary proceeding. I dissent.

I

The task of this court in a proportionality review is to analyze whether a presumptive sanction is proper by comparing the case at hand with other similarly situated cases in which the same sanction was approved or disapproved. *In re Disciplinary Proceeding Against Noble*, 100 Wn.2d 88, 95, 667 P.2d 608 (1983). The sanction must not depart significantly from sanctions imposed in similar cases. *Id*.

A. Mark Vanderveen was convicted of willful failure to file a report of receipt of currency of more than $10,000 as required by 31 U.S.C. §§ 5331(a) and 5322(a). He was sentenced to 3 months in prison and 90 days' home detention. Although there appears to be no Washington attorney discipline case which discusses that particular section of the United States Code, this court has on several occasions considered the appropriate sanction for attorneys convicted of the similar crime of willful failure to

file federal tax returns. For the purposes of a proportionality review, our rulings in disciplinary cases involving the crime of willful failure to file a tax return are appropriate for comparison because the willful failures to file either a currency report or a tax return are both crimes of omission (in that the criminal act is one of knowing inaction), they both have willfulness elements, they both involve filing similar documents to the same agency (the IRS), and they both carry similar sentences.

The failure to file an income tax return usually leads to suspension from practice. *In re Disciplinary Proceeding Against Witteman*, 95 Wn.2d 936, 937-38, 631 P.2d 961 (1981). Filing false and fraudulent tax returns, as Vanderveen noted in his brief, has resulted in disbarment. *Id*. at 937 (citing *In re Disciplinary Proceeding Against Seijas*, 52 Wn.2d 1, 318 P.2d 961 (1957)). In *Witteman*, the respondent attorney pleaded guilty to failure to file a federal income tax return and was fined and sentenced to six months' work release. Based on the guilty plea, and on a charge that the attorney had intentionally failed to represent one of his personal injury clients, the hearing officer recommended a suspension of 30 days. On review, this court explained it normally would impose a 6-month suspension for willful failure to file a tax return but found in mitigation the attorney had filed his returns and paid all back taxes owed before the criminal charges were filed, and held the 30-day suspension was proper. *Id*.

Other cases of record show the appropriate range of sanctions for a willful

failure to file federal tax returns runs from reprimand to a six-month suspension. In *In re Disciplinary Proceeding Against Molthan*, 52 Wn.2d 560, 327 P.2d 427 (1958), the respondent attorney was fined and sentenced to six months in prison after pleading nolo contendere to the charge of willful failure to file a federal tax return. *Id*. at 561. The bar association recommended disbarment, but this court held the appropriate sanction was to reprimand the attorney. *Id*. at 561, 565. This court, examining cases from other jurisdictions, noted that disbarment was appropriate only where the attorney had a "'purpose of cheating the Federal Government'" and had a "'*corrupt and criminal motive*.'" *Id*. at 564 (some internal quotation marks omitted) (quoting *In re Burrus*, 364 Mo. 22, 24, 258 S.W.2d 625 (1953) and *In re Means*, 207 Or. 638, 639, 298 P.2d 983 (1956)).

The attorney in *In re Disciplinary Proceeding Against English*, 64 Wn.2d 129, 130, 390 P.2d 999 (1964), failed to file tax returns for four years, pleaded guilty to a failure-to-file charge, and was fined and sentenced to six months' imprisonment. The bar association had sought a 90-day suspension, but this court held a reprimand was the appropriate sanction because the respondent had already voluntarily left the practice of law. *Id*. at 134.

In *In re Disciplinary Proceeding Against Caughlan*, 61 Wn.2d 557, 558, 379 P.2d 189 (1963), an attorney had been convicted by a jury of willful failure to file tax returns and had been fined and sentenced to eight months' imprisonment. This court

affirmed the disciplinary board's recommendation of a 30-day suspension. Similarly, in *In re Disciplinary Proceeding Against Greiner*, 61 Wn.2d 306, 378 P.2d 456 (1963), the attorney had pleaded guilty to two counts of failure to file and had been sentenced to three months' imprisonment. This court held a 90-day suspension was appropriate because the attorney had willfully failed to file tax returns for eight consecutive years. *Id*. at 313. In *In re Disciplinary Proceeding Against Carson*, 61 Wn.2d 304, 378 P.2d 450 (1963), an attorney failed to file tax returns for 11 consecutive years. He pleaded guilty to one count of failure to file and was sentenced to four months' imprisonment. This court held the appropriate sanction was a six-month suspension. *Id*. at 305 (citing *In re Disciplinary Proceeding Against Case*, 59 Wn.2d 181, 367 P.2d 121 (1961) (attorney fined and imprisoned for four months after failure-to-file conviction; suspended six months for conviction and for unprofessional conduct in an estate matter)).

This court has not affirmed a recommendation to disbar an attorney for a failure-to-file conviction, although it has disbarred an attorney for filing false and fraudulent tax returns. *See Seijas*, 52 Wn.2d at 1. In *Seijas*, the respondent attorney was convicted of filing fraudulent income tax returns and sentenced to five years imprisonment. This court held the crime of falsely and fraudulently filing returns was an act of dishonesty and moral turpitude and that disbarment was warranted. *Id*. at 3-4.

Vanderveen pleaded guilty to the crime of willful failure to file a currency report for the receipt of more than $10,000 cash. He was sentenced to 3 months' imprisonment and 90 days' home detention. The majority's affirmation of the sanction of disbarment departs significantly from the sanctions imposed in other, similar cases. *See Noble*, 100 Wn.2d at 95. Unlike the attorney in *Seijas*, who filed fraudulent returns and was sentenced to five years' imprisonment, Vanderveen was convicted of willful failure to file and given a three-month sentence. As in the willful failure to file cases of *Molthan*, 52 Wn.2d 560 (6-month sentence, disciplinary board recommended disbarment, this court reprimanded); *Caughlan*, 61 Wn.2d 557 (8-month sentence, given 30-day suspension from practice); *Greiner* (3-month sentence, 90-day suspension from practice); and *Carson* (4-month sentence, 6-month suspension), the appropriate sanction for a failure-to-file type of crime ranges from reprimand to suspension. An attorney must have the "corrupt" purpose of seeking to "cheat the Federal Government" in order for disbarment to be warranted, and that "corrupt" purpose must be manifested by an affirmative act such as a fraudulent filing.[1] Even absent mitigating factors, the appropriate proportional sanction is suspension. The majority errs in affirming the sanction of disbarment.

II

The majority likewise errs in affirming the disciplinary board's finding that

[1]*See Witteman*, 95 Wn.2d 936; *Molthan*, 52 Wn.2d 560; *Seijas*, 52 Wn.2d 1.

Vanderveen's conviction is conclusive evidence of "dishonesty." Since the only charge before us concerns Vanderveen's conviction for willful failure to file a currency report, any dishonesty must touch on the failure to file itself. In Washington, the failure to file a tax return is not itself sufficient to establish dishonesty or fraud for the purposes of an attorney discipline proceeding. An affirmative false or fraudulent act is required. *See Seijas*, 52 Wn.2d at 2 (citing *Tseung Chu v. Cornell*, 247 F.2d 929, 933 (9th Cir. 1957) and *Chanan Din Khan v. Barber*, 147 F. Supp. 771, 775 (N.D. Cal. 1957); *Molthan*, 52 Wn.2d at 563; *Witteman*, 95 Wn.2d at 937. As discussed *supra*, failure to file a tax return and failure to file a currency report are similar in that both have willfulness elements, both carry similar sentences, and both involve a knowing failure to act rather than an affirmative false act. The majority posits Vanderveen's receipt of two cash payments, placement of those payments in a personal safe rather than in the bank, and the failure to file a currency report together constitute dishonesty. Majority at 14-15, 17-18. But this case should not be confused with one where the charges include a misuse of client funds or a commingling, or where the attorney is accused of receiving a bribe, kickback, or otherwise wrongful payment, as no such charges are present here. "Dishonesty" and "concealing" are not elements of the crime of failure to file a currency report, and Vanderveen's conviction is not itself evidence of either. The majority errs in conflating Vanderveen's receipt of the cash with his failure to file a report regarding that cash. The sole disciplinary charge before

us stems from Vanderveen's conviction for failure to file a report of receipt of cash, and not for having wrongfully received, concealed, or misused that cash. Vanderveen's failure-to-file plea formed the basis of the conviction, the failure-to-file conviction forms the basis of the disciplinary charge before us, and as our case law indicates, any dishonesty, misrepresentation, or fraud must therefore be in the context of the failure to file itself.

In cases where attorneys willfully failed to file for many consecutive years, it could be argued that the attorneys were acting dishonestly by concealing their income from the government. Yet this court has not found dishonesty, fraud, or misrepresentation in such cases absent an affirmative act to deceive the federal government. Here, there is no evidence that Vanderveen attempted to deceive the federal government. In fact, the record indicates that Vanderveen first discovered the currency reporting requirement well after receiving the cash payments, in a phone call which was, unbeknownst to him, being recorded by federal investigators. Ex. 126B.[2]

[2] The majority argues that it was appropriate for the Washington State Bar Association to be permitted to introduce the circumstances of the cash payments as evidence Vanderveen was intentionally concealing them, but that it was proper to disregard transcripts from a secret wiretap indicating the first time Vanderveen discovered the reporting requirement was after he had already received the cash payment. Majority at 12-18. Although it is true that an attorney cannot contradict the essential elements of his conviction in a disciplinary proceeding, an attorney is permitted to offer evidence of mitigating circumstances. *In re Disciplinary Proceeding Against Perez-Pena*, 161 Wn.2d 820, 831, 168 P.3d 408 (2007) (citing The American Bar Association's comments to the Model Rules for Lawyer Disciplinary Enforcement (2007)). Here, although Vanderveen cannot use the transcript to challenge the willfulness element of the crime to which he pleaded guilty, the transcript should be properly considered in

Without an affirmative, deceptive act by Vanderveen toward the federal government (i.e., a false filing), under our case law a failure to file is not itself "dishonest" for disciplinary proceeding purposes, and the majority errs in affirming the disciplinary board's finding otherwise.

Vanderveen's conviction was not for a crime that involved dishonesty in that by failing to file there was no affirmative deceptive act toward the government, and as precedent indicates the appropriate proportional sanction for misconduct of Vanderveen's type is suspension from practice, I respectfully dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

the context of the disciplinary board's "dishonesty" finding.